

March 2, 2022

VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

In Re: Generic Docket to Study and Review Prefiled Rebuttal and Surrebuttal Testimony
in Hearings and Related Matters, **Docket No. 2021-291-A**

Dear Ms. Boyd:

On behalf of the South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Upstate Forever, Sierra Club, Natural Resources Defense Council, Vote Solar, North Carolina Sustainable Energy Association, and Carolinas Clean Energy Business Association, please find enclosed for filing in the above-captioned docket a *Petition for Reconsideration or Clarification of Commission Order No. 2022-58*.

Sincerely,

s/Kate Mixson

Southern Environmental Law Center
525 East Bay Street, Suite 200
Charleston, South Carolina 29403
Telephone: (843) 720-5270
Facsimile: (843) 414-7039

kmixson@selcsc.org

*Counsel for South Carolina Coastal
Conservation League, Southern Alliance for
Clean Energy, Upstate Forever, Sierra Club,
Natural Resources Defense Council, Vote
Solar, North Carolina Sustainable Energy
Association*

s/Richard L. Whitt

Whitt Law Firm, LLC,
401 Western Lane, Suite E
Irmo, South Carolina 29063
(803) 995-7719

Richard@RLWhitt.law

*Counsel for Carolinas Clean Energy
Business Association*

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION
DOCKET NO. 2021-291-A

In the Matter of:)	NONPROFIT INTERVENORS’
Generic Docket to Study and Review)	PETITION FOR
Prefiled Rebuttal and Surrebuttal)	RECONSIDERATION OR
Testimony in Hearings and Related)	CLARIFICATION OF COMMISSION
Matters)	ORDER NO. 2022-58
)	

The South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Upstate Forever, Sierra Club, Natural Resources Defense Council, Vote Solar, North Carolina Sustainable Energy Association, and Carolinas Clean Energy Business Association (collectively, “Nonprofit Intervenor”) respectfully request reconsideration or, in the alternative, clarification of Commission Order No. 2022-58 (“Order”), issued in Docket No. 2021-291-A (the “Generic Surrebuttal Docket”) on February 10, 2022.

BACKGROUND AND PROCEDURAL HISTORY

On September 2, 2021, the Commission issued Directive Order No. 2021-661(A) opening a generic docket “to study and review prefiled rebuttal and surrebuttal testimony in hearings and related matters.” On November 3, 2021, the Commission approved a motion requesting comments from interested stakeholders and persons regarding the procedure, requirements, and timelines for prefiled testimony and exhibits, including the need for prefiled rebuttal and surrebuttal testimony. Order No. 2021-736. A variety of parties, including utilities, intervenors, and the South Carolina Office of Regulatory Staff (“ORS”) submitted comments on November 17, 2021.

On February 10, 2022, the Commission issued Order No. 2022-58, which established the following revised surrebuttal testimony procedures, made effective immediately upon issuance of the Order:

- (1) When developing the procedural schedule where pre-filed testimony is anticipated, the Commission Clerk's Office shall establish a deadline wherein an appropriate party may file a Motion to Pre-File Surrebuttal Testimony. The Motion shall be filed after any rebuttal testimony has been pre-filed, and shall provide the Commission with good cause, if any, as to why the party should be allowed to pre-file surrebuttal testimony in the specific case.
- (2) A date shall also be set for the pre-filing of surrebuttal testimony, should the Commission grant the Motion.
- (3) Should the Motion be granted for good cause, the surrebuttal testimony may be pre-filed. If good cause is not shown, the moving party may not pre-file surrebuttal testimony.

In the Order, the Commission states that unlike rebuttal testimony, surrebuttal testimony is not a matter of right but is discretionary with the Commission,¹ and that surrebuttal testimony “must be viewed as somewhat different from other testimony, because if presented, it comes at a point in a proceeding where the parties have submitted their direct exhibits, and have also had an opportunity to respond to other parties’ testimony and exhibits.”² The Order further provides that “if rebuttal is limited to responding to other parties’ direct testimony, as intended, then surrebuttal testimony should rarely, if ever, be necessary.”³

¹ Order No. 2022-58 at 1 (citing Palmetto Alliance v. South Carolina Public Service Commission, 319 S.E. 2d 695 (S.C. 1984))

² Order No. 2022-58 at 1.

³ Id.

PETITION FOR RECONSIDERATION

I. Applicable Law

Pursuant to S.C. Code Ann. Section 58-27-2150, a party may petition the Commission for reconsideration or rehearing in respect to any matter determined in the proceeding. S.C. Code Ann. Regs. § 103-825(A)(4) provides that a petition for rehearing or reconsideration must include (a) the factual and legal issues forming the basis for the petition; (b) the alleged error or errors in the Commission order; and (c) the statutory provision or other authority upon which the petition is based. “The purpose of a petition for rehearing and/or reconsideration is to allow the Commission the discretion to rehear and/or reexamine the merits of issued orders pursuant to legal or factual questions raised about those orders by parties in interest, prior to a possible appeal.”⁴

II. Argument

The Order drastically changes longstanding Commission practice and imposes new administrative and procedural burdens on intervening parties, including ORS, that will undermine the efficiency of Commission proceedings, bias proceedings against intervenors, and are at odds with the Commission’s stated objectives in opening this proceeding. Nonprofit Intervenors therefore request that the Commission reconsider Order No. 2022-58 in its entirety and allow surrebuttal testimony to be prefiled as a matter of right. If the Commission denies reconsideration, Nonprofit Intervenors, in the alternative, seek clarification from the Commission on the Order’s application in various ongoing and impending Commission proceedings.

1. The Order establishes procedures that will make Commission proceedings lengthier, less efficient, and more burdensome.

⁴ In re: South Carolina Electric & Gas Company, Order No. 2013-05 (Feb. 14, 2013).

As a quasi-judicial body, the Commission is “allowed a wide latitude of procedure and not restricted to the strict rule of evidence adhered to in a judicial court.”⁵ The general purpose of this latitude is so administrative agencies that serve both fact-finding and judicial functions—often in technical or specialized areas—may admit testimony that might otherwise be inadmissible, so long as due process standards are not violated.⁶ While surrebuttal testimony is discretionary with the Commission,⁷ Commission regulations also prioritize efficiency and procedural fairness. S.C. Code Ann. Regs. 103-802 states that the Commission’s rules of procedure are “intended to insure that all parties participating in proceedings before the Commission will be accorded the procedural fairness to which they are entitled by law [and] to promote efficiency in, and certainty of, the procedures and practices herein adopted.” The efficiency and procedural fairness promoted by these regulations are in service to the Commission’s role as regulator of South Carolina’s utilities, ensuring that the state’s utilities act in the interest of ratepayers and the general public.

The Commission’s recent Order imposes an additional, intermediate deadline on intervenors after the filing of rebuttal testimony by which intervenors (including ORS) must file a motion requesting leave to file surrebuttal testimony; schedules under this new procedure must also include a later deadline for surrebuttal testimony if leave is granted. Put simply, there is not enough time in Commission procedural schedules to allow for this

⁵ Jacoby v. S.C. State Board of Naturopathic Examiners, 64 S.E.2d 138, 149 (S.C. 1951) (“An administrative or quasi judicial body is allowed a wide latitude of procedure and not restricted to the strict rule of evidence adhered to in a judicial court”); see also Hallums v. Michelin Tire Corp., 419 S.E.2d 235, 239 (Ct. App. 1992).

⁶ See, e.g., Calhoun v. Marlboro Cnty. Sch. Dist., 2004 WL 5334910 at *6 (S.C. Ct. App. 2004) (holding that a school board was entitled to admit hearsay evidence regarding parent and teacher complaints because school board hearings are quasi-judicial in nature).

⁷ See Palmetto Alliance v. South Carolina Public Service Commission, 319 S.E. 2d 695 (S.C. 1984),

additional deadline, particularly given the typically short turnaround times for rebuttal testimony, surrebuttal testimony, and the hearing date. It is not uncommon in Commission proceedings for surrebuttal testimony to be due a week, or sometimes less, after rebuttal testimony is filed, with hearings often falling just a few days thereafter. After rebuttal testimony is filed—often late in the day, and commonly extensive and complex in nature—intervenors require at least several days for counsel and experts to thoroughly review the testimony for new issues and determine whether surrebuttal is warranted.

The Order does not contemplate the time that would be required just for parties to prepare motions for leave to file surrebuttal testimony, let alone the *additional* time that would need to be built into procedural schedules to account for parties' responses to said motions (10 days), replies (an additional 5 days), or the time required for the Commission to review and rule on the motion. And, after that lengthy process, intervenors would still require time to prepare surrebuttal testimony if leave was granted. Unless procedural schedules are lengthened significantly, which would further constrain the Commission's schedule, the Order sets forth procedures with which intervenors simply will not have the time to comply. Indeed, a recent procedural order in Piedmont Natural Gas Co.'s 2022 annual fuel adjustment proceeding (Docket No. 2022-4-G) demonstrates the difficulties that Order No. 2022-58 poses for Commission procedural schedules; under the procedural schedule, which was revised after Order No. 2022-58 was issued, intervenors and ORS must move for leave to file surrebuttal testimony *one day* after the utility files rebuttal testimony.⁸

⁸ In a Feb. 15, 2022 letter filed with the Commission in Docket No. 2022-4-G, ORS requested that the Commission remove this deadline for filing a motion to prefile surrebuttal testimony on the grounds that it was unreasonable and unfairly prejudicial.

2. The revised surrebuttal procedures set forth in the Order do not resolve the Commission's concerns that led to the creation of this proceeding.

More fundamentally, the Commission's revisions to the surrebuttal procedures fail to address the concerns regarding responsive testimony that prompted the Commission to open this proceeding. In Commissioner Caston's motion requesting parties' comments in this proceeding, he stated as follows:

I have noticed that often the substance of Direct Testimony and Exhibits may not be as robust in evidentiary support and explanation of an applicant's petition or application and that the Rebuttal Testimony may contain more substance and evidentiary support than the Direct Testimony.

As this motion indicates, the Commission established this docket due to concerns about deficiencies in applications and direct testimony filings that delayed disclosure and discussion of key issues in proceedings until the rebuttal and surrebuttal testimony stages.

As one example, in the 2021 Dominion Energy South Carolina ("DESC") avoided cost proceeding, DESC did not disclose or offer support for its gas price forecast—a key factor in setting avoided energy rates—in its application or direct testimony, but rather explained its gas price forecast for the first time in rebuttal.⁹ As a result, surrebuttal testimony was the first opportunity for intervenors to respond to the Company's rationale for choosing those essential forecasts. In noting her disagreement with the Commission's approach in Order No. 2022-58, Vice Chair Belser recognized that deficient utility applications and/or testimony have forced intervenors to file more extensive surrebuttal testimony. Specifically, she noted:

This matter really starts with the [] filing of the application and the completeness of what needs to be in the application...What I've seen happen over the years is that an

⁹ See Rebuttal Testimony of James Neely at 4-7 (Docket No. 2021-88-E); Direct Testimony of Kenneth Sercy at 34 (Docket No. 2021-88-E)

application is filed, perfunctory direct testimony is filed that doesn't give a lot of reasoning necessarily but a lot of generalities, and then once the intervenors [], based on their discovery and other discussions with the applicant, once they file their testimony, then *in rebuttal* we see the case-in-chief really be presented, and I think that's backwards...So, I think that the process we have now allows for completeness, because often times there is significant surrebuttal due to the amount of detail that is being presented on rebuttal that should have been presented on direct.¹⁰

Commissioner Caston also noted that these concerns were valid.¹¹

However, the process established by the Order does not address the underlying problem that led to the creation of this proceeding: utility applications and direct testimony lack detail and transparency, necessitating more robust surrebuttal testimony. Instead, due to the timing constraints noted above, the Order functions *only* to limit intervenors' ability to file testimony responding to those issues a utility does not disclose until the rebuttal phase. While the Order provides that the revised surrebuttal procedures were warranted in part because surrebuttal "comes at a point in a proceeding where the parties have submitted their direct exhibits, and have also had an opportunity to respond to other parties' testimony and exhibits," Nonprofit Intervenors respectfully submit that this observation is true only when complete and transparent applications and direct testimony are filed in the first place. As Vice Chair Belser noted, that is not always the case.

In effect, the Order creates an imbalanced process that disproportionately burdens intervening parties and ultimately could prevent the admission of relevant and helpful testimony that would ensure a fuller record on which the Commission can base its

¹⁰ Commission Business Meeting (Jan. 27, 2022) at 00:30:44-00:34:00, [Public Service Commission | South Carolina ETV \(scetv.org\)](#)

¹¹ Commission Business Meeting (Jan. 27, 2022) at 00:34:20-00:34:45, 00:37:45-00:38:05, [Public Service Commission | South Carolina ETV \(scetv.org\)](#)

decisions. In fact, many recent Commission orders have relied heavily on testimony presented in surrebuttal.¹² Permitting surrebuttal testimony as a matter of course not only avoids logistical and fairness concerns, it also ensures a fuller record before the Commission. While we recognize the Commission's concerns regarding surrebuttal testimony that exceeds the proper scope, a fairer and more efficient means of resolving such a dispute is for the party opposing the admission of the testimony in question to file a motion to strike, after which the Commission could reject any testimony or evidence that goes beyond response to issues introduced on rebuttal.

Should the Commission decline to grant this Petition for Reconsideration, Nonprofit Intervenors request that the Commission issue a revised order to remedy the unclear and disproportionately burdensome aspects of Order No. 2022-58, in particular:

- To accommodate the new requirements in Order No. 2022-58, future procedural schedules must: 1) Allow intervenors *at least* 10 days to review rebuttal testimony, determine whether surrebuttal is necessary, and file a motion requesting leave to file surrebuttal; 2) Permit hearing officers to issue directives on motions for leave to file surrebuttal; 3) Allow intervenors *at least* 20 days following a directive on a motion for leave to file surrebuttal to seek reconsideration of the directive and/or prepare surrebuttal testimony for filing. In total, the additional time needed to comply with Order No. 2022-58 will be at least a month, likely more, and some dockets with extensive testimony, such as IRP dockets, may require even more time.
- Order No. 2022-58 should not apply to the dockets with procedural schedules set out in Order No. 2021-57, which are determined in Docket No. 2005-83-A and are especially time constrained due to the nature of those proceedings.

¹² As one example, Commission Order No. 2020-832 in the DESC 2020 Integrated Resource Plan proceeding relied heavily on surrebuttal testimony from ORS and intervenors, including from South Carolina Solar Business Alliance (now Carolinas Clean Energy Business Association) Witness Kenneth Sercy. *See* Order No. 2020-832 at 29, 33-34, 40, 43-44, 46, 48-49, 51-52, 58, 64, 70-71, 84-86, 87-88, 89-93. It is worth noting that Witness Sercy's surrebuttal testimony responded to 100 pages of DESC rebuttal testimony (excluding exhibits), highlighting the extensive nature of rebuttal testimony and intervenors' need for significant time to review. In addition to the DESC IRP proceeding, the Commission has in the past year adopted recommendations from and relied on surrebuttal testimony in Net metering dockets (Docket Nos. 2019-182-E, 2020-229-E, 2020-264-E, 2020-265-E), the Duke Energy IRP proceeding (Docket Nos. 2019-224-E, 2019-225-E), and DESC avoided cost proceeding (Docket No. 2021-88-E).

While modifications would not resolve all the challenges created by the Order, they would lessen the burdens imposed on intervenors and the Commission by the new surrebuttal requirements.

REQUESTS FOR CLARIFICATION

Should the Commission deny the above Petition for Reconsideration, Nonprofit Intervenors seek clarification on several aspects of Order No. 2022-58. As written, the Order creates a number of procedural complications and questions that can only be resolved through additional time, which in some instances is not available.

1. Applicability of Order No. 2022-58 to Open Dockets with Existing Procedural Schedules

Nonprofit Intervenors seek clarification on whether the Order applies in dockets where the Commission issued procedural schedules prior to the Order's issuance and which establish a deadline for surrebuttal testimony. Several Nonprofit Intervenors have recently intervened or plan to intervene in proceedings that include deadlines to file surrebuttal testimony, among them the 2022 Duke Energy Progress, LLC annual fuel cost proceeding (Docket No. 2022-1-E), and DESC's Application for the Approval of New Natural Gas Energy Efficiency Programs (Docket No. 2021-361-G).

Chief Hearing Officer David Butler recently issued a directive in the DESC annual fuel cost proceeding (Docket No. 2022-2-E) clarifying that intervenors are not required to request leave to file surrebuttal testimony because the Clerk's letter setting the procedural schedule was issued prior to the Order.¹³ However, that directive was limited to Docket No. 2022-2-E and thus uncertainty remains in other similarly situated dockets, including Docket Nos. 2022-1-E and 2021-361-G. Accordingly, Nonprofit Intervenors request

¹³ Order No. 2022-12-H.

direction on other dockets in which a procedural schedule with surrebuttal was issued prior to Order No. 2022-58.

2. Applicability to Dockets with Standing Procedural Orders

Nonprofit Intervenors also seek clarification on the applicability of Order No. 2022-58 to recurring proceedings that have standing procedural schedules established by Commission order, such as the utilities' annual fuel proceedings. Those schedules do not establish a deadline for intervenors to petition for leave to file surrebuttal, and are so condensed that they conflict with the process established under Order No. 2022-58. For example, Order No. 2021-57 adopts a schedule in Duke Energy Progress and Carolinas fuel proceedings that allows 1) just one week between rebuttal and surrebuttal testimony and 2) a weekend between the surrebuttal deadline and the start of the hearing. Last year, Duke Energy petitioned for reconsideration of those schedules, arguing that requiring surrebuttal one business day prior to the hearing was inconsistent with due process requirements and the Commission's own rules, specifically, the rule requiring parties to file motions and discovery not less than ten days before a hearing.¹⁴ Duke Energy requested that the Commission instead allow a seven day window between surrebuttal and the hearing date.¹⁵ However, the Commission rejected that petition, noting that "the limited time available for a fuel proceeding just does not allow for [more time]" and that the timing constraints in fuel proceedings are "necessitated by needing the most current information on fuel costs to be presented at the proceeding."¹⁶ In denying Duke Energy's petition, the

¹⁴ Order No. 2021-357 at 1-2.

¹⁵ *Id.*

¹⁶ Order No. 2021-357 at 2.

Commission also noted that both rebuttal and surrebuttal should be limited and thus not time consuming to prepare and review in the days before a hearing. *Id.*

As discussed above, these established deadlines simply cannot accommodate the new requirements in Order No. 2022-58 that require intervenors to file a motion and also obtain an order on that motion prior to preparing surrebuttal. Accordingly, Nonprofit Intervenors seek clarity on how the procedures in Order No. 2022-58 will affect the dockets with pre-determined and time-constrained procedural schedules.

3. Commission Review of Motions for Leave to File Surrebuttal Testimony

Lastly, Nonprofit Intervenors request clarification about whether the Commission will rule on motions for leave to file surrebuttal testimony during its scheduled business meetings, or if these rulings could be issued by a Hearing Officer to avoid procedural delays.

CONCLUSION

For the reasons set out above, Intervenors respectfully request reconsideration or, in the alternative, clarification of the Order issued in the Generic Surrebuttal Docket on February 10, 2022. The Order will reduce the efficiency of Commission proceedings, impose significant burdens on intervenors and the Commission, and may even prevent the admission of relevant and helpful testimony that would ensure a fuller record. Accordingly, Nonprofit Intervenors seek reconsideration or, in the alternative, additional clarification and procedural measures to lessen the burdens created by the Order.

Respectfully,

s/Kate Mixson
Southern Environmental Law Center
525 East Bay Street, Suite 200
Charleston, South Carolina 29403

Telephone: (843) 720-5270

Facsimile: (843) 414-7039

kmixson@selcsc.org

*Counsel for South Carolina Coastal
Conservation League, Southern Alliance for
Clean Energy, Upstate Forever, Sierra Club,
Natural Resources Defense Council, Vote
Solar, North Carolina Sustainable Energy
Association*

s/Richard L. Whitt

Whitt Law Firm, LLC,

401 Western Lane, Suite E

Irmo, South Carolina 29063

(803) 995-7719

Richard@RLWhitt.law

*Counsel for Carolinas Clean Energy
Business Association*

CERTIFICATE OF SERVICE

I hereby certify that the parties listed below have been served via first class U.S. Mail or electronic mail with a copy of the *Petition for Reconsideration or Clarification of Order No. 2022-58* on behalf of South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Upstate Forever, Sierra Club, Natural Resources Defense Council, Vote Solar, and North Carolina Sustainable Energy Association.

Andrew M. Bateman, Counsel
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, South Carolina 29201
abateman@ors.sc.gov

Carri Grube Lybarker, Consumer Advocate
S.C. Department of Consumer Affairs
Post Office Box 5757
Columbia, South Carolina 29250
clybarker@scconsumer.gov

Belton T. Zeigler
Womble Bond Dickerson (US) LLP
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
Belton.zeigler@wbd-us.com

Charles L.A. Terreni, Counsel
Terreni Law Firm, LLC
1508 Lady Street
Columbia, South Carolina 29201
Charles.terreni@terrenilaw.com

Christopher M. Huber
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, South Carolina 29201
chuber@ors.sc.gov

Emma C. Clancy
Southern Environmental Law Center
525 East Bay Street, Suite 200
Charleston, South Carolina 29403
eclancy@selcsc.org

Frank R. Ellerbe, III, Counsel
Robinson Gray Stepp & Lafitte, LLC
Post Office Box 11449
Columbia, South Carolina 29211
fellerbe@robinsongray.com

Jeffrey W. Kuykendall, Counsel
Attorney at Law
127 King Street, Suite 208
Charleston, South Carolina 29401
jwkuykendall@jwklegal.com

K. Chad Burgess, Dir. & Dept Gen Counsel
Dominion Energy Southeast Services, Inc.
220 Operation Way – MC C222
Cayce, South Carolina 29033
Chad.burgess@dominonenergy.com

Katie M. Brown, Counsel
Duke Energy Progress, LLC
40 West Broad Street, DSC 556
Greenville, South Carolina 29601
Katie.brown2@duke-energy.com

M. John Bowen, Jr., Counsel
Burr & Forman LLP
Post Office Box 11390
Columbia, South Carolina 29211
jbowen@burr.com

Margaret M. Fox, Counsel
Burr & Forman LLP
Post Office Box 11390
Columbia, South Carolina 29211
pfox@burr.com

Matthew W. Gissendanner, Sr. Counsel
Dominion Energy Southeast Services, Inc.

Richard L. Whitt, Esquire
Whitt Law Firm

220 Operation Way – MC C222
Cayce, South Carolina 29033
Matthew.gissendanner@dominionenergy.com

Roger P. Hall, Dept. Consumer Advocate
S.C. Department of Consumer Affairs
Post Office Box 5757
Columbia, South Carolina 29250
rhall@scconsumer.gov

Post Office box 362
Irmo, South Carolina 29063
richard@rlwhitt.law

Vordman C. Traywick, III, Counsel
Robinson Gray Stepp & Lafitte, LLC
Post Office Box 11449
Columbia, South Carolina 29201
ltraywick@robinsongray.com

This 2nd day of March, 2022.
S/Kate L. Mixson